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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

~~HELI RAMON SANCHEZ and~~ AIDA SANCHEZ,
Individually And As Representative And Administratrix
Of The Children And Estate Of
HELI RAMON SANCHEZ, DECEASED,
Petitioners

v.

LOFFLAND BROTHERS COMPANY, LOFFLAND BROTHERS DE VENEZUELA, C.A., LOFFLAND BROTHERS DE VENEZUELA, INC., LOFFLAND BROTHERS OF CANADA, INC. and MID-CONTINENT SUPPLY COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, Heli Ramon Sanchez and Aida Sanchez, individually and as representative and administratrix of the children and estate of Heli Ramon Sanchez, deceased, pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on October 1, 1980, be granted.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the estate of a Jones Act[1] seaman, fatally injured outside the territorial waters of the United States, has, coextensive with its Jones Act cause of action, a *Moragne*[2] general maritime law death action available to it.

2. Whether the Circuit Court's holding that, despite the fact decedent was a Jones Act seaman, the *"Higginbotham*[3] rationale compels the application of the DOHSA[4] statute of limitations in undiluted force to a wrongful death claim under general maritime law which arises outside the United States territorial waters", was correct in the face of the import of *Moragne,* which created a remedy under the general maritime law for wrongful death and provided that such remedy should "share the doctrine of laches immemorially applied to admiralty claims"; the dicta in *American Export Lines, Inc. v. Alvez,*[5] wherein the Court stated that it does not "read the Jones Act as sweeping aside general maritime law remedies"; and a second circuit decision, *Public Administration of the County of New York v. Angela Compania Naviera, S.A.,*[6] which directly held that the estate of a Jones Act seaman, whose death occurs outside the territorial waters of the United States, may sue under the general maritime law, with such claim being subject only to laches.

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1. 46 U.S.C. 688.

2. 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

3. Mobil Oil v. Higginbotham, 436 U.S. 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978).

4. 46 U.S.C. 761, et seq.

5. ____U.S.____, 64 L.Ed.2d 284, 100 S.Ct. 1673.

6. 592 F.2d 58 (2nd Cir., 1979).

III

3. Whether the Circuit Court's holding that laches barred Petitioners' claim was erroneous and contrary to *Czaplicki v. The Hoegh Silvercloud,*[7] in view of the undisputed procedural facts that the Respondents did not plead laches in the District Court; that none of the Respondents urged laches as grounds for motion to dismiss or summary judgment but, instead, expressly stated that the laches issue was not before the District Court at that time; that the District Court limited factual discovery to the issue of equitable estoppel only, precluding discovery as to any other fact issue such as laches; and that the District Court did not even consider or pass upon the question of laches.

4. Whether the Circuit Court's holding that as a matter of law the Petitioners were barred by laches was contrary to the record, particularly in view of the fact that Respondents failed to rebut, with any evidence, the allegations of Petitioners of excusable delay and absence of prejudicial harm.

5. Whether the Circuit Court's holding that the record did not establish a fact question on the issue of equitable estoppel was erroneous, particularly in view of the Circuit Court's erroneous approach, also employed by the District Court, of extracting from the record the testimony most favorable to the proponents of the summary judgment and in limiting the application of the equitable estoppel doctrine to far narrower parameters than suggested in *Glus v. Brooklyn Eastern District*[8] and all other extant relevant decisions.

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7. 351 U.S. 525, 100 L.Ed.2d 1387, 76 S.Ct. 946 (1956).

8. 359 U.S. 232, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959).

6. Whether the Circuit Court erred in refusing to follow *Camerlin v. New York Central Railway Company,*[9] *Wittlin v. Giacalone,*[10] *Semaan v. Mumford,*[11] and *Adams v. The United States*[12] to the effect that "if a witness has made an affidavit and his deposition has also been taken, and the two in some way conflict, the Court may not exclude the affidavit from consideration in the determination of the question of whether there is any genuine issue as to any material facts", the Circuit Court thereby refusing to consider the affidavits of Ms. Sanchez' brother and son for the alleged reason that such affidavidts were contrary to deposition testimony of Ms. Sanchez.

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9. 199 F.2d 698 (1st Cir. 1952).
10. 154 F.2d 20 (Ct. of App. D.C., 1946).
11. 335 F.2d 704 (Ct. of App., 1964).
12. 92 F.Supp. 1272 (U.S.D.C., E.D. Wis., 1975).

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioner Aida Sanchez, Individually and as Representative of the Estate of Heli Sanchez, Deceased;

Petitioner children of Heli Sanchez, Deceased:

Eli Ramon Sanchez

Jose Rafael Sanchez

Omer Antonio Sanchez

Jose Gregorio Sanchez

Loly Marine Sanchez Cordozo

Carmen Elena Sanchez Cordozo

Heli Ramon Sanchez

Neliza Coromoto Sanchez Cordozo

Eneida Margot Sanchez Cordozo

Loffland Brothers Company, Respondent

Loffland Brothers de Venezuela, C.A., Respondent

Loffland Brothers de Venezuela, Inc., Respondent

Loffland Brothers of Canada, Inc., Respondent

Mid-Continent Supply Company, Respondent

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II. The action of the Court of Appeals in considering the question of laches, which was not raised by the Respondents in the District Court and not considered by the District Court, is in direct contravention of this Court's ruling in Czaplicki and really is so far of a departure from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of review.	16

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III. Regardless of the procedural improprieties, the Court of Appeals' holding that the record justified a finding in favor of Respondents on the question of laches, as a matter of law, is just as much a departure from "accepted and usual course of judicial proceedings", calling for an exercise of this Court's power of review, as the Court of Appeals' consideration of the question of laches in the first place. 17

IV. The Court of Appeals' narrow and restrictive approach to the doctrine of equitable estoppel, and its holding that a fact question did not exist in this case with respect to such doctrine, are so contrary to the rationale and factual holdings of previous decisions of this Court and decisions of numerous other circuit courts, including the Fifth Circuit, that such holding constitutes a departure so far from the accepted and usual course of judicial proceedings as to call for this Court to exercise its power of review. 20

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

1. The opinion of the District Court was delivered the 20th day of December, 1979, Cause No. H-77-1198, in

the United States District Court for the Southern District of Texas, Houston Division (unreported). The judgment of the District Court is attached hereto as Appendix 1.

2. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, dated the 1st day of October, 1980 is reported in 626 F.2d 1228 (5th Cir. 1980); Civil Action No. 80-1025, United States Court of Appeals for the Fifth Circuit. The judgment and opinion of the United States Court of Appeals, Fifth Circuit, are attached hereto as Appendices 2A and 2B.

3. The order of the United States Court of Appeals, Fifth Circuit, denying Petitioners' Petition for Rehearing and Rehearing En Banc is dated the 8th day of January, 1981. Said order is attached hereto as Appendix 3.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals (Appendix 2) was entered on October 1, 1980. A timely petition for rehearing and rehearing en banc was denied on January 8, 1981 (Appendix 3). The jurisdiction of this Court is invoked nder 28 U.S.C. § 1254(1).

STATUTES AND RULES WHICH THIS CASE INVOLVES

1. This case involves an interpretation of the Jones Act, 46 U.S.C. § 688, and related provisions of the Federal Employers Liability Act, 45 U.S.C. § 56; the Death on the High Seas Act, 46 U.S.C. 761, and 46 U.S.C. § 763; Rule 8(c) of the Federal Rules of Civil Procedure and Rule 56 of the Federal Rules of Civil Procedure. These are reprinted in pertinent part as Appendices 4A-4F to this Petition.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Petitioners filed suit on July 27, 1977 and, by their original and amended complaint, alleged that on February 3, 1974 the decedent, Heli Ramon Sanchez, while working as a seaman aboard a vessel owned and operated by the Respondents, sustained fatal injuries outside the territorial waters of the United States, as a result of the negligence of the Respondents and the unseaworthiness of the vessel; the Petitioners asserted a cause of action under both the Jones Act and the general maritime law (Rec. 1-5, 100-110). The Respondent Loffland Brothers filed a motion to dismiss in response to Petitioners' original complaint, asserting that the Petitioners cause of action was barred by the two-year Death on the High Seas Act statute of limitation and/or the three-year Jones Act statute of limitation (Rec. 54-59). In response to Respondents' Motion to Dismiss, Petitioners, in their amended complaint, asserted that only laches would bar their general maritime law cause of action and expressly alleged that laches would not apply because "Defendants have not been prejudiced by the very brief delay in bringing this suit. . . ." (Rec. 108 and 107). Petitioners further asserted the doctrine of equitable estoppel, alleging that the Petitioners delayed filing suit because of the representations and conduct of the Respondents' agents and representatives (Rec. 107 and 109).

Thereafter, the District Court entered an order limiting all discovery "to the area of equitable estoppel" (Rec. 99). The depositions of Mrs. Sanchez and two Loffland employees, Sevilliano and Lujan, (see depositions) were thence taken and affidavits of the decedent's son and brother-in-law were filed by Petitioners (Rec. 164, 166).

Respondent Loffland filed its answers to Petitioners' interrogatories, admitting that they had notice of the accident and Petitioners' potential claim on February 7, 1974 (Rec. 34) and Respondents' agent, Lujan, testified on deposition that he thence investigated the accident on behalf of Respondents (Depo. 15, 16). Thereafter, the Loffland Respondents filed their Motion for Summary Judgment, again only contending that Petitioners' causes of action were barred by the DOHSA and Jones Act statutes of limitation and again failing to assert laches as a defense (Rec. 125-136). The Loffland Respondents, in a supplemental response, stated: "Initially, Plaintiffs' counsel considers the doctrine of laches and discusses it at length. This doctrine, however, is *not urged at this time by Defendants* for it is clear that the statutes of limitation are the controlling factors insofar as suit time in this context is concerned." (Rec. 169, emphasis ours). The only other Respondent, Mid-Continent Supply Company, filed a motion for summary judgment solely on the ground that Petitioners' causes of action were barred by the statutes of limitations (Rec. 181).

The Respondents offered absolutely no evidence to show any prejudicial harm resulting from the filing of the suit three years and six months after the date of accident (see entire record). The District Court, in granting summary judgment for all Respondents, clearly confined its consideration and decision solely to the issue presented: whether the statute of limitations of DOHSA and/or the Jones Act barred the suits; the issue of laches was neither considered nor decided (Rec. 190-195).

The Court of Appeals agreed with the District Court that *Higginbotham* extended to the estates of Jones Act

seaman suffering wrongful death outside the territorial waters of the United States and, by necessary implication, held that such estates did not have a *Moragne* death action available to them. Therefore, said the Circuit Court, the Petitioners cause of action was barred by the DOHSA statute of limitations (See Appendix 2). The Court of Appeals also agreed with the narrow application given the doctrine of equitable estoppel by the District Court and in so doing agreed with the District Court's refusal to consider the affidavit evidence of the son and brother-in-law of the decedent on the theory that such evidence contradicted the deposition testimony of the widow. But the Court of Appeals did not stop there. Astoundingly, although the Respondents had not raised the issues of laches in the District Court and the District Court did not consider the issue, the Court of Appeals took it upon itself to hold that the Respondents, who had offered no evidence on the matter, had as a matter of law established the defense of laches.

B. Factual Evidence Relating To Question Of Equitable Estoppel

In support of their allegations of equitable estoppel the Petitioners relied upon the deposition of Mrs. Sanchez and the affidavits of the decedent's son and brother-in-law. Mrs. Aida Sanchez testified on deposition that she was the widow of the decedent and that they had had eight children (Depo. 6); that during decedent's life he had only worked for oil companies, including Loffland Brothers and Delta Drilling (Depo. 8-10); that she first heard from a representative of the company five days after her husband's death when Mr. Lujan of "Loffland" came to see her with papers (Depo. 22-24);

that all discussions with Mr. Lujan took place in the presence of her son, Ramon Sanchez, her brother, Even Cardozo, her husband's cousin, Lusano, and her daughters, Carmen and Melissa (Depo. 25-26, 27, 45, 47); that Lujan told her that she should sign the papers because "this was all the claims that my husband had with the company, that it included two paychecks, one that they had always held back and the one that was due as of the last day that he worked for them, and the day of the accident . . . that this was all that I could claim but that my children would not be left alone, that the company would help us, that my son could work . . . that they were going to help him (my son) study . . . that they would probably send him to the United States so that he could specialize in a course with English . . . that they would help me in all ways . . . when I signed the paper he (Lujan) told me I had nothing else to claim of Loffland Company, that the company was going to offer help, that they were going to hire my son and they were going to offer me help for me and for my children . . . that that was all that the company owed me and I had nothing else to claim . . . I trusted in him (Lujan), and in Loffland. . . ." (Depo. 27, 28, 69, 80, 81); that in reliance upon all of these statements and others that she *only then* signed the papers, accepted the money, and because of the representations of Lujan she did not go to see a lawyer or seek any other help or advice about her legal rights or remedies (Depo. 29, 30, 31, 32); that she continued believing Lujan until finding out that she might have other rights (thence she immediately filed this suit in the U.S.) (Depo. 34, 35); that her son did indeed get a job seventeen days after her husband's death (Depo. 32); that later on she went to see Mr. Sevilliano after she heard that Loffland might let some of the employees off and

he "told me not to worry (about my son's job), that as long as Loffland had work in Venezuela, that my son would work for the company . . . at that time I believed in Loffland even more" (Depo. 32, 33); that she believed and relied upon Lujan's statement that she had no other claims (Depo. 35); and she believed the representations of Lujan and Sevilliano that the company would take care of her and her son (Depo. 36); she stated that "*I didn't look for any other lawyer because I believed in what the people at Loffland who went to my house had said. . . .*" (Depo. 39). Mrs. Sanchez testified further that she had never had an attorney before hiring her Venezuelan attorney who immediately arranged the filing of this suit in the United States (Depo. 57).

Mrs. Sanchez had only a fourth grade education and testified she was forced to leave school in the fourth grade because "my head hurt" (Mrs. Sanchez' depo. p. 73). She testified how very dependent she had been upon her deceased husband (Depo. 13) and felt so "bad" about his death at the time of her crucial conversation with Lujan that "I could not be alone" (Depo. 51). She testified through an interpreter (Depo. 4), got upset during the deposition (Depo. 71) and was susceptible to being easily led by Defendant's attorney (e.g., p. 44 where she stated that Lujan worked for "Loffland Brothers Company" and then was immediately led to say "Loffland Brothers de Venezuela, C.A.").

Mrs. Sanchez' son, Heli Ramon Sanchez, swore by affidavit that he was present during the Lujan conversation with his mother and corroborated her testimony about what transpired and expressly noted that Lujan "also told my mother that it was preferable to always be in agreement with Loffland, because like that Loffland

would protect her and attend to her needs, and *that it was not convenient for her to be in opposition to the company* . . . (and) that it was preferable to be in agreement with Loffland, because like they would give me a job and they would pay her what they were giving her at that time, *and that if she was not in agreement with this payment, they could not give her anything and they would then not give me a job.*" (Rec. 164-166 and see Appendix 5 for translation; emphasis ours.)

Mrs. Sanchez' brother, Even Cardozo, swore by affidavit that he, too, was present during the Lujan conversation with his sister and he, too, corroborated the testimony of Mrs. Sanchez. He pointed out that Lujan told Mrs. Sanchez "that the best thing would be to continue with Loffland, because the company was going to help her, and that in addition, so that she would not have any economic problems, they were going to give a job to the son of my sister, Heli Ramon Sanchez, *as long as she didn't maintain any action against the company, and that she would receive the payment* . . . (and) that it was necessary that she sign to give a job to my nephew, and to give her the money that he had brought, *because if she didn't sign, he would take the payment back to Loffland and then they wouldn't give a job to my nephew,* Heli Ramon Sanchez". (Rec. 164-166 and Appendix 6 for translation; emphasis ours).

C. Basis For Federal Jurisdiction In The District Court

The jurisdiction of the District Court was sought by Petitioners under the Jones Act and Death on the High Seas Act, both federal statutes, and the general maritime law of the United States.

ARGUMENT AND REASONS FOR ISSUANCE OF WRIT

I.

The Court of Appeals' holding that Higginbotham extends to the estate of Jones Act seaman fatally injured outside the territorial waters of the United States has far reaching consequences and because such holding directly contradicts a decision of the second circuit, is contrary to the rationale of Moragne, Gaudet,[12a] Higginbotham and Alvez, when all are construed together, and so far departs from an accepted course of judicial interpretation, the exercise of this Court's power of review is called for.

The Court of Appeals' holding that the Plaintiffs' claim is barred by the DOHSA two-year statute of limitation rests on the premise that *Higginbotham* precludes the availability of the general maritime law to the estate of a Jones Act seaman involved in a fatal accident outside the territorial waters of the United States, just as much as it precludes the availability of the remedy to the estate of non-seamen in such circumstances. But this Court, in dicta in *Alvez,* stated that it "did not read the Jones Act as sweeping aside general maritime law remedies", and in making that statement the Court did not expressly make its application dependent upon the location of the accident. The import of the Court's language in *Alvez* corroborates the express holding of the second circuit, reached prior to *Alvez,* in *Naviera.* In that case, the court thoroughly analyzed *Moragne, Gaudet* and *Higginbotham* and concluded, in direct contradiction to the holding of

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12a. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974) at p. 577.

the Court of Appeals in this case, that "when a death is caused outside territorial waters (to a Jones Act seaman), and when a wrongful death action is brought under the general maritime law . . . (such) general maritime law cause of action is . . . available to plaintiffs", and the timeliness of such action "is to be determined under the doctrine of laches" (citing *Moragne,* 592 F.2d at p. 63).

Indeed, the legislative history of the Jones Act makes it quite clear, by its silence on the matter, as well as implications from statements contained in the committee reports and other legislative history, that Congress, when it enacted the Jones Act, did not intend to preempt the general maritime law remedy. There is absolutely nothing in the legislative history of the Jones Act or past judicial precedent, except possibly *Higginbotham,* which would justify the harsh and narrow attitude taken by the District Court and the Court of Appeals in this case toward seaman's rights. Where in the legislative history or past judicial precedence is there any justification for the construction that the Jones Act precludes the availability of the general maritime law remedy to the estate of a seaman *killed* outside the territorial waters of the United States but does not preclude the availability of the general maritime law remedy to a seaman *only injured* outside the territorial waters of the United States? Where in the legislative history of the Jones Act or judicial precedence is there any justification for a construction that Congress intended to provide the general maritime law remedy to the estate of a Jones Act seaman killed within the territorial waters of the United States but not to the estate of a Jones Act seaman killed outside the territorial waters of the United States? Where in the legislative history of the Jones Act or judicial precedence is there any justifica-

tion for the view that the estate of a Jones Act seaman fatally injured outside the territorial waters of the United States can sue under the Jones Act and DOHSA but not under the Jones Act and the general maritime law?

The only answer to these questions given by the Respondents, the District Court and the Court of Appeals is *Higginbotham*. But, let us look at what this very Court said about *Higginbotham* in *Alvez*:

> "To be sure, Mobil Oil Corp. v. Higginbotham, supra, construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But Higginbotham never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit." (____U.S. at p. ____; 64 L.Ed.2d at p. 291; 100 S.Ct. at p. 1678).

The Court then observed, with language that was dicta to the case at hand in *Alvez*, but, we submit, significantly relevant to the question here, thus:

> ". . . Nor do we read the Jones Act as sweeping aside general maritime law remedies. . . . Furthermore, the Jones Act lacks such preclusive effect even with respect to true seamen; . . . Apart from the question of statutory pre-emption, the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law. The two statutes were enacted within days to address related problems—yet they are 'hopelessly inconsistent with each other.' Gilmore & Black, supra, at 359; see id., at 360-367. The Jones Act itself was not the product of careful drafting or attentive legislative review, id., at 277, 327; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act, 45 USC §§ 51 et seq. [45

> USCS §§ 51 et seq.], which was incorporated into the Jones Act, see e.g., Ivy v. Security Barge Lines, 606 F.2d 524, 526 (CA5 1979) (en banc), cert. pending, No. 79-1228. Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that 'no intention appears that the [Death on the High Seas Act] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.' Moragne, supra, at 400, 26 L.Ed.2d 339, 90 S.Ct. 1771; Gaudet, Supra, 414 U.S., at 588, n.22, 39 L.Ed.2d 9, 94 S.Ct. 806." (____U.S. at pp. ____; 64 L.Ed.2d at p. 292; 100 S.Ct. at pp. 1678, 1679).

Moreover, since there is nothing in the express language of the Jones Act, nor, as we stated above, in its legislative history, which would even suggest that it was intended to preclude the general maritime law remedy from estates of Jones Act seamen fatally injured outside the territorial waters of the United States, the general rule of statutory construction applied in *Alvez* becomes applicable here:

> ". . . But it is a settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' . . . Plainly, neither statute (Longshore and Harbor Workers Act[12b] and Jones Act) embodies an established and inflexible rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law." (____U.S. at p.____; 64 L.Ed.2d at p. 291; 100 S.Ct. at pp. 1677, 1678).

12b. 33 U.S.C. 901, et seq.

The second circuit, in *Naviera*, in a decision antedating this Court's language in *Alvez*, wisely anticipated the course we believe this Court set for itself in *Alvez*. The Court of Appeals in this case concedes that its decision is in direct conflict with the second circuit's decision in *Naviera* (see Appendix 2). We of course agree with *Naviera's* holding that the estate of a Jones Act seaman fatally injured outside the territorial waters of the United States has a general maritime law remedy barred only by laches but we believe this Court will, and should, follow the implications of *McAllister v. Magnolia Petroleum Co.*[13] and hold that the Jones Act three-year limitation period should be the analogous statute for the purposes of determining laches.[13a]

It is from the point of departure of *McAllister* and *Doyle*,[14] which were not overruled by *Higginbotham*, that the vital importance of the Court's granting certiorari in this case becomes apparent. The Court must face the ultimate decision of whether the estate of a Jones Act seaman, fatally injured outside the territorial waters of the United States, has a *Moragne* general maritime law death claim coextensive with the Jones Act claim or whether it is relegated to the inhospitable and narrow confines of DOHSA? We urge the former, the fifth circuit chose the latter, and the second circuit fell somewhere in between. Judicial confusion and uncertainty will continue if this Court does not resolve the question.

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13. 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958).

13a. In *Naviera*, the Court held that the two year DOHSA statute of limitation was the analogous period for determining the applicability of laches to a general maritime law death claim.

14. *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465 (CA 2nd Cir. 1966).

The answer can be found, we believe, in *Moragne*, whose immortality was clearly reaffirmed, after *Higginbotham*, by the Court in *Alvez*. This Court stated in *Moragne*:

> ". . . The ruling (in *Gillespie v. United States Steel Corp.*)[15] thus does not disturb the seaman's rights under general maritime law, *existing alongside his Jones Act claim*, to sue his employer for injuries caused by unseaworthiness, see McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 2 L.Ed.2d 1272, 78 S.Ct. 1201 (1958), or for death on the high seas caused by unseaworthiness, see Kernan v. American Dredging Co., 355 U.S. 426 n.4, 2 L.Ed. 2d 382, 387, 78 S.Ct. 394 (1958); Doyle v. Albatross Tanker Corp., 367 F.2d 465 (CA2d Cir. 1966); cf. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1953). Likewise, the remedy under general maritime law that will be made available by our overruling today of The Harrisburg seems to be beyond the preclusive effect of the Jones Act as interpreted in Gillespie." (emphasis ours; 398 U.S. at p. 396; 26 L.Ed.2d at p. 354; 90 S.Ct. at p. 1785).

Need we say more? We could say more by extensively discussing pre-Moragne decisions such as *McAllister v. Magnolia Petroleum Co.*, supra; *Kernan v. American Dredging Co.*, supra and *Doyle v. Albatross Tanker Corp.*, supra, but we choose only to make a few brief observations about them. In *McAllister* the Court stated:

> ". . . Since the seaman must sue for both unseaworthiness and Jones Act negligence in order to make full utilization of his remedies for personal injury, and since that can be accomplished only in

15. 379 U.S. 148, 13 L.Ed.2d 198, 85 S.Ct. 308 (1964).

> a single proceeding, a time limitation on the unseaworthiness claim effects in substance a similar limitation on the right of action under the Jones Act. Congress has provided that a seaman shall have three years to bring his action under the Jones Act. A state court cannot reduce that time by applying its own statute of limitations to such an action. . . . As an essential corollary of that proposition, it may not qualify the seaman's Jones Act right by affixing a shorter limitation to his *concurrent right* of action for unseaworthiness." (emphasis ours; 357 U.S. at p. 225; 78 Sup. Ct. at p. 1204).

In *Kernan* the Court held that the estate of Jones Act decedent could recover under the Jones Act on grounds other than negligence and in *Doyle* the court held that the estate of a Jones Act seaman fatally injured outside the territorial waters of the United States could, prior to *Moragne,* sue under both the Jones Act, alleging negligence, and DOHSA, alleging unseaworthiness. The court pointed out pertinently that "(u)nlike the Death on the High Seas Act the applicability of the Jones Act is not restricted to occurrences that have taken place farther from the shores of the United States than a marine league . . ." (367 F.2d at p. 466). Now that we have *Moragne,* we are led to the ultimate question of why should not the estate of a Jones Act decedent, as distinguished from the estate of a non-Jones Act decedent, be entitled, if the liberal and humane purposes of the Jones Act are to given effect, to bring its suit under *Moragne,* the more beneficial cause of action in admiralty, then be forced to bring its suit under the less hospitable DOHSA? *Alvez* has the answer: ". . . it is a settled canon of maritime jurisprudence that it better becomes the humane and liberal character of proceedings in admiralty to give (the better remedy) than to withhold (it)."

II.

The action of the Court of Appeals in considering the question of laches, which was not raised by the Respondents in the District Court and not considered by the District Court, is in direct contravention of this Court's ruling in Czaplicki and really is so far of a departure from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of review.

Frankly, it is unbelievable that the Court of Appeals in this case would decide as a matter of law that laches barred this action, in view of the procedural posture of this case. In *Czaplicki,* supra, the Supreme Court expressly held that where the issue of laches is not passed upon by the District Court, the Court of Appeals must remand the case to the District Court for a determination of that issue. In *Financial Systems Leasing Corporation v. Pugh,* 530 F.2d 91 (5th Cir. 1976), the Circuit Court held that the failure to plead an affirmative defense (such as laches)[15a] precludes such matter from being considered on motion for summary judgment and thus upon subsequent appeal. See also *Naviera,* supra, where the Court of Appeals held that since the District Court had not passed upon the elements of laches, the case had to be remanded to the District Court for such determination. And see *Pfau v. Whitcover,* 139 F.2d 588 (4th Cir. 1943).

A review by this Court of the Court of Appeals' action in considering a question not raised in the District Court is vitally important because such action makes a mockery of due process. If the Court of Appeals' decision is left

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15a. Rule 8(c) of FRCP expressly states that "laches" is an affirmative defense.

undisturbed, the door will be open in all cases to a stream of new contentions and positions taken as an after thought, to the equitable disadvantage of the opposite party, at any stage of the proceedings, even at the appellate court level. The effect of the Court of Appeals' decision in this regard and its impact upon our system of justice is ominous and certainly qualifies this case, under the test laid down by Rule 17 of the U.S. Supreme Court rules, for the grant of a writ of certiorari.

III.

Regardless of the procedural improprieties, the Court of Appeals' holding that the record justified a finding in favor of Respondents on the question of laches, as a matter of law, is just as much a departure from "accepted and usual course of judicial proceedings", calling for an exercise of this Court's power of review, as the Court of Appeals' consideration of the question of laches in the first place.

With regard to the question of laches, in *Czaplicki, Gardner v. Panama Railway Company,*[16] and in many circuit court cases,[17] such as *Larios v. Victory Carriers,*

16. 342 U.S. 29, 96 L.Ed. 31, 72 S.Ct. 12 (1951).

17. See *Flowers v. Savannah Machine & Foundry Company,* 310 F.2d 135 (5th Cir. 1962); *Watz v. Zapata Offshore Company,* 431 F.2d 100 (5th Cir. 1970); *McMahon v. Pan American World Airways,* 297 F.2d 268 (5th Cir. 1962); *Molnar v. Gulf Coast Transit,* 371 F.2d 639 (5th Cir. 1967); *Akers v. State Marine Lines, Inc.,* 344 F.2d 217 (5th Cir. 1965); *Crews v. Arundel Corp.,* 386 F.2d 528 (5th Cir. 1967); *Powell v. City of Key West, Florida,* 434 F.2d 1075 (5th Cir. 1970); *Ecology Center of Louisiana v. Coleman,* 515 F.2d 860 (5th Cir. 1975); *Fidelity & Casualty of New York v. C/B Mr. Kim,* 345 F.2d 47 (5th Cir. 1965); *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973) and *McDaniel v. Gulf & South American SS Company,* 228 F.2d 189 (5th Cir. 1955) where the Court held that ". . . when the question of laches is raised by exceptions or

Inc.,[18] the courts have made it clear that the expiration of the statute of limitations does not create a "presumption of prejudice save in the sense that if the Plaintiff proffers no pleading or presents no proof on the issue of laches, the Defendant wins". As the court in *Larios* observed, the Plaintiff is not required to present "anticipatory evidence to negate prejudice on the part of the Defendants, an issue as to which the Defendant, with his greater knowledge, is to be required to come forward . . . rather, when a Plaintiff who asserts a martime claim after the . . . statute has run, presents evidence tending to excuse his delay, the Court must weigh the legitimacy of his excuse, the inference to be drawn from the expiration of the (analogous) statute, and the length of the delay, along with evidence as to prejudice *if* the Defendant comes forward with any." (emphasis ours; 316 F.2d at p. 66, 67).

In this case, not only did the Respondents not assert laches in the District Court or raise the issue in connection with the motion for summary judgment, but they offered absolutely no evidence of prejudice, despite the fact that the Petitioners had alleged specifically that the Respondents suffered no prejudice by the delay in filing and had produced considerable evidence of excuse for such delay (see the deposition of Mrs. Sanchez and the affidavits of her son and brother-in-law[19]); yet the Court

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demurrer, as here, the allegations of the Plaintiff must ordinarily be assumed to be true".

18. 316 F.2d 62 (2nd Cir. 1963).

19. All this evidence is the same evidence that we discussed in the statement above concerning equitable estoppel; certainly such evidence is at least sufficient to raise the issue of excusable delay for not filing prior to the expiration of the analogous statute of limitation.

of Appeals held that laches had been established as a matter of law. This unbelievable conclusion is reached even though the *only* evidence in the record on the prejudice question tends to show that Respondents suffered *no* prejudice by the delay in filing. As pointed out in *Watz*:

> ". . . That no harm having been shown by reason of the delay for filing the plaintiff's cause of action and by reason that he did not prevent one witness or any evidence from being heard and by reason of the fact that all the defendants, Zapata Off-Shore Company and Eaton Yale & Towne, Inc., had notice within a matter of months after the occurrence that the doctrine of laches or limitations does not apply." (431 F.2d at p. 111-112; emphasis ours).

Barrios v. Nelda Faye, Inc.[19a] states the correct rule to the effect that "if the shipowner knew of the incident, made a detailed investigation and still has facts concerning the injury and its disabling consequences in the form of evidence . . . the equitable principles of laches ought not to become the absolute obstacle to a determination of the intrinsic merits of the claim". In this case it is undisputed that the Defendants were immediately notified of the accident in question, and immediately conducted an investigation. As pointed out above, Respondents made no effort to show that they do not still have available to them the facts concerning the injury and the accident or that they suffered prejudice in any way.

The action of the Court of Appeals in concluding as it did, not only contradicting long established Supreme Court authority and authority from other circuits, but summarily (it should be noted that the Court of Appeals

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19a. 597 F.2d 881 (5th Cir. 1979).

in this case disposed of this case by summary procedure) overruling a wealth of authority from within its own circuit, should clearly demonstrate to this Court that the Court of Appeals in this case was acting in a manner that "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

IV.

The Court of Appeals' narrow and restrictive approach to the doctrine of equitable estoppel, and its holding that a fact question did not exist in this case with respect to such doctrine, are so contrary to the rationale and factual holdings of previous decisions of this Court and decisions of numerous other circuit courts, including the Fifth Circuit, that such holding constitutes a departure so far from the accepted and usual course of judicial proceedings as to call for this Court to exercise its power of review.

At the outset, the Court of Appeals applied too restrictive a criteria, one that has not been adopted by any court that we know of, in ascertaining whether or not there was a fact question concerning equitable estoppel in this case. The Court of Appeals stated that equitable estoppel is available *only* where either the Defendant has "made active misrepresentations to Plaintiff regarding the Plaintiff's legal rights" or "where the Defendant promised to pay the claim or to settle if the Plaintiff did not file suit." As the evidence discussed in the statement above clearly indicates, even if the Court of Appeals had been correct in its restrictive criteria, a fact question exists in this case, precluding summary judgment. Mrs. Sanchez repeatedly testified that the Respondents told her that she

had no other rights and that this was one of the reasons she sought no legal advice until just before she filed suit. Such statements were misrepresentations as to the Petitioners' rights and they were actively made by the Respondents' agents.

As to the second possibility stated by the Court of Appeals, the Respondents' agent offered Mrs. Sanchez money, promised her son a job and assured her that Respondents would take care of her and her family in the future as long as, as her son and brother swore, "she didn't maintain any action against the company". The Court of Appeals, in a footnote, indicated that it gave little, if any, weight to the sworn statements of the brother and son as to what transpired in the crucial conversation between the widow and the company representatives. This action of the Court of Appeals directly contradicts *Camerlin v. New York Central Railway Company,* supra; *Wittlin v. Giacalone,* supra; *Semaan v. Mumford,* supra; *Adams v. The United States,* supra; and *Moore's Federal Practice,* Vol. 6, § 56.15(4), p. 56-522, Ftnt. 49, the latter stating:

> "An opposing party's affidavit should be considered (in passing upon a motion for summary judgment) although it differs from or varies evidence given by deposition or another affidavit and the two in conjunction may disclose an issue of credibility." (Moore's, p. 56-522).

Thus, the Court of Appeals and the District Court committed grievous error in not considering the affidavits of the son and brother of Ms. Sanchez.

Even so, it is clear that the affidavit evidence of the brother and son *does not contradict* Mrs. Sanchez' testimony but *simply adds* some other things that were said

during the conversation between her and the company representative. At no place in her deposition did Mrs. Sanchez expressly deny what her son and her brother stated in their affidavits. As pointed out above, Mrs. Sanchez was not well educated, was very nervous during the deposition, and was easily led by the Defendants' counsel. This is one of those cases, as Judge Hutcheson stated in *Loudermilk v. Fidelity and Casualty Company*,[20] where the "triers of fact, whose business it is not only to hear what men say but to search for and find the roots from which the sayings spring, should be afforded full opportunity to determine the truth and integrity of this case". As this Court stated in the celebrated case of *Poller v. Columbia Broadcasting System*,[21] trial by affidavit is no substitute for a jury trial, "the hallmark of even-handed justice."

In any event, all relevant decisions indicate that the grounds for equitable estoppel are far broader than those espoused by the Court of Appeals in this case. *Burke v. Gateway Clipper*,[22] *Schroeder v. Young*,[23] *Glus v. Brooklyn Eastern District Terminal*,[24] supra; *Longo v. The*

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20. 199 F.2d 561 (5th Cir. 1952).

21. 360 U.S. 464, 82 S.Ct. 46, 7 L.Ed.2d 458 (1962).

22. The very case that the Court of Appeals relied on most heavily to justify its holding, *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3rd Cir. 1971), adds a catch-all ground for equitable estoppel: "comparable representations and conduct".

23. 161 U.S. 334, 40 L.Ed.2d 721, 16 S.Ct. 512; *Schroeder* is the lead case concerning the "doctrine of lulling". The Court there stated that where a party is lulled into a false sense of security by the statements or conduct of the Defendant, such Defendant is estopped to assert the statute of limitations.

24. In this important case, this Court stated the test of equitable estoppel:

"To decide the case we need to look no further than the maxim that no man may take advantage of his own wrong. Deeply

Pittsburgh and Lake Erie Railroad Company in New York Central System,[25] *Louisville and Nashville Railroad Company v. Disspain,*[26] *Scarborough v. Atlantic Coast Line Railroad Company,*[27] *United States v. Fidelity and Casualty Company of New York,*[28] *United States v. Reliance Insurance Company,*[29] *Bomba v. W. L. Belvidere,*

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rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar an equitable reliance on statutes of limitations."

Moreover, the Court held that the representations in question can either be intentionally fraudulent or mistakenly incorrect as long as they are statements upon which the Plaintiff relied in delaying the bringing of suit.

25. In *Longo,* 355 F.2d 443 (3rd Cir. 1966), the company representative indicated to the plaintiff that the company would make a better settlement than he could obtain by suing and that he might lose his job if he should file suit against the company. Such representations are very similar to those in this case.

26. 275 F.2d 25 (6th Cir. 1966). This case involved representations by the Defendant's doctor that there was nothing wrong with the Plaintiff and that he should return to work; the Plaintiff in reliance upon such representations delayed filing suit beyond the statute of limitations and the Court held that the Defendants were equitably estopped; we cannot see the difference in the Respondents' representative telling Mrs. Sanchez that she had no claim, upon which she relied, and the Defendant's doctor in *Disspain* telling the plaintiff there that he had no claim because he was not hurt, upon which he relied.

27. 178 F.2d 253 (4th Cir. 1949) cert. denied, 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1443.

28. 402 F.2d 893 (4th Cir. 1968). The Court, in quoting from *United States for Use and Benefit of Nolan Company v. Wood,* 99 F.2d 80 (4th Cir. 1938), stated the test simply as follows:

". . . a person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith *and such that a reasonable man would rely upon the representations made* . . .". (Emphasis ours).

29. 436 F.2d 1366 (10th Cir. 1971).

Inc.,[30] *Begnaud v. White*,[31] *Moore's Federal Practice* § 56.17(21); and *Brown v. State Farm Mutual Automobile Casualty Insurance Company*.[32]

In summary, it would seem that the better test, and the one which the Court of Appeals rejected in this case, is one that comports with the humane purposes of the Jones Act and with the beneficent purposes of equity. That test should simply be the reasonable man test, i.e., whether or not the statements and conduct of the Defendants are sufficient to cause a reasonable man to defer filing suit. The court in *Bomba* states the equitable estoppel test as follows:

> "Rather, all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff *reasonably rely* on the defendant's conduct or representations in forbearing suit." (emphasis ours)

It is extremely important for this Court to grant review of the Court of Appeals decision in this case as it related to the equitable estoppel issue for the following reasons: 1) the approach taken by the Court of Appeals is directly contrary to the decisions of this Court and the courts of other circuits; the Court of Appeals in this case limited equitable estoppel to two specific situations, despite the

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30. 579 F.2d 1067 (7th Cir. 1978). In *Bomba* the court held that a promise to pay the plaintiff's claim is sufficient, without more, to estop the defendant from asserting the statute of limitations. The promises of the Defendant in this case, to take care of the Plaintiff's family indefinitely and to give her son a job, were in effect promises to pay the Plaintiff's claim. Mrs. Sanchez specifically testified that these promises led her to defer seeking legal counsel and bringing suit on her claim.

31. 170 F.2d 323 (6th Cir. 1940).

32. 506 F.2d 976 (5th Cir. 1975).

fact that this Court and all the other courts indicate that a jury could find equitable estoppel from a broad set of disparate circumstances, the essential element being that the actions of the Defendants would lead a reasonable person into delaying the filing of suit; 2) regardless of the approach the Court of Appeals took in this case, its conclusion that there was insufficient evidence to raise a fact issue as to equitable estoppel absolutely defies the record and the large quantity of evidence indicating that Mrs. Sanchez was reasonably led, by the statements of the agents for the Respondents, into delaying the filing of suit or seeking legal advice; 3) the holding of the Court of Appeals that it would not consider the affidavit testimony of the son and brother-in-law, because it conflicted with the deposition testimony of Mrs. Sanchez, is directly contrary to prevailing law in other circuits, particularly *Camerlin v. New York Central Railway Company,* supra, and *Adams v. The United States,* supra.

CONCLUSION AND PRAYER

In this case, the Petitioners did not get a semblance of a fair trial. Aside from the very important question involving the right of the estate of a Jones Act seaman, fatally injured outside the territorial waters of the U. S., to a *Moragne* death action, this widow and her nine children had a clear right to have the equitable estoppel issue and the laches issue heard by a jury. The Court of Appeals' decision in this case is one that is bad—from start to finish. Because it touches on so many areas of the law, it is our humble view that the highest Court in our land simply cannot leave something this bad standing. Every case involving Jones Act seamen fatally injured outside the territorial waters of the U. S. will be

affected by the Court of Appeals' decision in this case;[32a] the many cases involving the equitable estoppel issue will be affected; and, most important, all of the numerous cases involving summary judgment motions will be vitally affected. Other ancillary matters, such as due process on appeal (considering laches for the first time in the appellate court), directly affect *every* case that will be appealed.

The decision of the Court of Appeals in this case is bad enough to justify a per curiam reversal by this Court. One of the best examples of why this is so, is the manner in which the Court of Appeals summarily sanctioned the District Court's methodical emasculation of Rule 56, F.R.C.P. The extraction from the record of the testimony and evidence most favorable to the proponents of the summary judgment, and the insistence upon drawing from such evidence every possible inference favorable to such proponents, totally convolutes the burdens established by Rule 56 and unquestioned Supreme Court authority.[33] This and the other radical departures from sound judicial precedence manifested in the Court of Appeals' decision should, we respectfully suggest, shock the judicial conscience of this Court.

Petitioners respectfully move the Court to grant Writ of Certiorari in order to resolve the very important ques-

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32a. 94 Stat. 1525, passed October 6, 1980 establishes a uniform 3 year statute of limitations for all maritime actions from and after the effective date of the statute; however, the measure of damages (Gaudet) in such death actions, the nature of the action and proper parties, among other things, will still be affected by the Court of Appeals' decision.

33. *See e.g.*, Poller v. Columbia Broadcasting System, supra; Adickes v. S. H. Kress & Co., 90 S.Ct. 1598, 398 U.S. 144, 26 L.Ed 2d 142 (1970).

tions related above and the conflicts between the decision of the Court of Appeals in this case and the decisions of other circuit courts, as well as decisions of this Court; and, upon proper briefing and hearing upon the merits, Petitioners request this Court to reverse this cause and remand same to the District Court for the Southern District of Texas for trial on the merits.

Respectfully submitted,

BENTON MUSSLEWHITE
3506 Travis Street
Houston, Texas 77002
(713) 520-0621

CERTIFICATE OF SERVICE

I hereby certify that I mailed this date three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to each of the following attorneys, being the only other attorneys of record: Mr. Ted C. Litton, 3710 One Shell Plaza, Houston, Texas 77002, who represents the Loffland Defendants and Mr. John P. Forney, Jr., 947 Mellie Esperson Building, Houston, Texas 77002, who represents Mid-Continent Supply Company on this ~~8th~~ 24th day of April, 1981.

BENTON MUSSLEWHITE

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-77-1198

HELI RAMON SANCHEZ, et al.,
Plaintiffs

v.

LOFFLAND BROTHERS COMPANY,
Defendant.

MEMORANDUM AND ORDER

Plaintiff filed this action under the Jones Act, 46 U.S.C.A. § 688, and general maritime law, based upon the death of Heli Ramon Sanchez. The incident in question occurred on February 3, 1974, on Lake Maracaibo, in Venezuela. Suit was instituted on July 27, 1977. Presently pending before this Court is Defendant's motion for summary judgment based on the applicable statute of limitations.

The Jones Act incorporates the Federal Employers' Liability Act's three year statute of limitations, 45 U.S. C.A. § 56. Plaintiff's cause of action arose more than three years prior to filing suit and is clearly barred by the limitations period of the Act,[1] except under equitable circumstances as discussed *infra*.

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1. Neither infancy nor any other disability can toll the running of the statute, *Sgambati v. U.S.*, 172 F.2d 297 (2nd Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); Gilmore and Black, *The Law of Admiralty*, 299-300 n.165; *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978).

Plaintiff's remedy under general maritime law is foreclosed under the authority of *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), as interpreted by the Fifth Circuit in *Ivy v. Security Barge Line, Inc.,* 585 F.2d 732 (5th Cir. 1978), *reh. en banc,* No. 76-4130 (5th Cir. Nov. 13, 1979).

Plaintiff, however, claims that Defendants are estopped from asserting the statute of limitations. The nature of the representations and of the conduct of Defendants are of crucial significance in determining if Plaintiff is to be allowed to invoke this equitable principal of estoppel. *Burke v. Gateway Clipper, Inc.,* 441 F.2d 946 (3rd Cir. 1971). The *Burke* case sets out a test indicating that there must be (1) an affirmative statement that the statutory period to bring the action was longer than it actually was, or (2) promises to make a better statement of the claim if Plaintiff did not bring suit, or (3) comparable representations and conduct.

The deposition of Aida Sanchez, wife of the decedent, and Plaintiff in this action, does not show that she was misled by Defendants so that she delayed suit. Her position can be summarized in the following testimony:

Q. You didn't have any question that it was Loffland Brothers' de Venezuela position that they were paying you all the money that you were owed under the contract or under the Venezuela law; did you?
A. I didn't doubt—
Q. That that was their position.
A. Well, I didn't doubt that.
Q. And Mr. Lujan, when he came to your house, told you that, according to your testimony that that was all that was owed to you, but that if

there was anything that they could do for you, to let them know? Is that, in effect, what he said?

A. Yes.

Q. Okay. Your son was later given a job by Loffland Brothers de Venezuela?

A. Of work, a job.

Q. Is he still working for Loffland Brothers de Venezuela?

A. Yes.

Q. He hasn't been terminated?

A. No.

Q. As far as you know, he's doing a day's work for a day's pay?

A. Yes.

Q. All right. What is it that you testified that Mr. Lujan somehow indicated that the company would take care of the children and you? Was this just as a result of his saying if there is something we can do for you, let us know?

A. Yes.

Q. All right. And is this, in effect, the same thing that you were later told by Mr. Sevillano?

A. When I went to talk with Mr. Sevillano about my son being laid off, he told me that as long as Loffland had work, that my son would work.

Q. As long as your son did the work that he was supposed to do?

A. Yes.

Q. Loffland Brothers de Venezuela has never promised to pay you any other money than what you received under [(the agreement relating to settlement of benefits due under Venezuelan law)].

A. Never.

Sanchez deposition at 52, line 20—54, line 13.

Q. Did [representatives of Loffland Brothers de Venezuela, C.A.] tell you that any additional money that you would receive would have to

come from the social security scheme of Venezuela?

A. Yes.

Q. Was any mention made to you at all concerning American law or American rights or remedies by representatives of Loffland Brothers de Venezuela?

A. No.

Q. Nothing whether you did or did not have any rights under those laws?

A. Never.

Q. Okay.

A. Never did they mention that.

Q. Nothing about how long you had to bring a lawsuit—how much time you had to bring a lawsuit in the U.S.?

A. No.

Q. Have you told us all of the conversations you had with anybody employed by Loffland Brothers de Venezuela, C.A.?

A. Those that I told you about are the conversations I've had.

Q. And those are the only ones?

A. Yes.

Q. And you have told us all that was said in those conversations?

A. I don't understand.

Q. And you have told us the substance, all of the substance of those conversations?

A. Yes.

Q. Okay. As far as you know, have you ever had a conversation with somebody who was employed by Loffland Brothers Company, an American company?

A. I don't understand.

Q. Okay. You've never had any conversations with any Americans employed by any of the—by any company whose name in anyway contained the word Loffland; have you?

A. I've spoken to Mr. Benton who is the only American.
Q. Your lawyer?
A. My lawyer.

Sanchez deposition at 55, line 15—57, line 8.

The only apparent support for the assertion of equitable estoppel is a statement in the affidavit of Even Cardozo, brother-in-law of the deceased. He states that Lujan of Loffland Brothers de Venezuela, C.A. told Aida Sanchez that "it was better to go along with Loffland because the company was going to help and also she would not have economic problems because they would give work to the son of my sister, Heli Ramon Sanchez, always, as long as she did not go against the company in any action and would receive the pay." In her deposition Aida Sanchez makes no mention of not pursuing a court proceeding. She stated that no mention was made to her concerning American rights or remedies. Deposition, *supra* at 55. In fact, Lujan and Sevillano stated that they had no knowledge of American rights and remedies. Lujan deposition at 49; Sevillano deposition at 49-50. Thus, although Cardozo might have thought otherwise, Aida Sanchez was apparently not misled and it is her subjective belief that this Court is concerned with. Furthermore, from the standpoint of the policy and requirements of Rule 56 of the Federal Rules, this Court declines to allow the use of the affidavit to raise an issue of fact by contradicting Plaintiff's own deposition, a more reliable source. It is only *genuine* issues of fact that are intended to preclude resort to summary judgment. *See Holifield v. Cities Service Tanker Corp.*, 421 F.Supp. 131, 136 (E.D. La. 1976), *aff'd*, 552 F.2d 367 (5th Cir. 1977).

Accordingly, Defendant's motion for summary judgment is GRANTED.

Done at Houston, Texas, this 20th day of December, 1979.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-77-1198

HELI RAMON SANCHEZ, et al.,
Plaintiffs

v.

LOFFLAND BROTHERS COMPANY,
Defendant.

FINAL JUDGMENT

From a consideration of the pleadings and materials submitted in this cause, it is the opinion of this Court that summary judgment should be and is hereby granted for Defendants.

This is a FINAL JUDGMENT.

Costs will be awarded to the prevailing party.

Done at Houston, Texas, this 20th day of December, 1979.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX 2A

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 80-1025

Summary Calendar

D. C. Docket No. CA H 77 1198

HELI RAMON SANCHEZ and AIDA DE SANCHEZ, Individually and as representative and Administratrix of the Children and Estate of HELI RAMON SANCHEZ,
Plaintiffs-Appellants,

v.

LOFFLAND BROTHERS COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, RUBIN and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 1, 1980

Issued as Mandate: Jan. 23, 1981

APPENDIX 2B

Heli Ramon SANCHEZ and Aida De Sanchez, Individually and as representative and Administratrix of the children and estate of Heli Ramon Sanchez, Plaintiffs-Appellants,

v.

LOFFLAND BROTHERS COMPANY et al., Defendants-Appellees.

No. 80-1025

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Oct. 1, 1980

The widow of a deceased seaman brought action for wrongful death of the seaman. The United States District Court for the Southern District of Texas, Norman W. Black, J., granted summary judgment in favor of the defendant, and plaintiff appealed. The Court of Appeals held that suit under the Death on the High Seas Act and under the Jones Act were time-barred and defendant was not estopped from asserting bar of limitations.

Affirmed.

Appeal from the United States District Court for the Southern Disrict of Texas.

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

The widow of a deceased seaman contends that: (1) an action for the wrongful death of a Jones Act seaman can be maintained under the general maritime law after the expiration of the statute of limitations provided in the Jones Act[1] and the Death on the High Seas Act[2] and (2) the district court erred in awarding summary judgment against her because a genuine issue exists as to whether the employer was equitably estopped to raise the applicable statute of limitations. We conclude that this action is time-barred and that no genuine factual issue precluded summary adjudication of the estoppel issue.

Plaintiff filed an action under the Jones Act, 46 U.S.C. § 688, and under general maritime law for the wrongful death of her husband, Heli Ramon Sanchez, on February 3, 1974, in the course of his employment. The decedent was a seaman employed by Loffland Brother on a vessel in operation on Lake Maracaibo, Venezuela. This suit was filed more than three years later, on July 27, 1977, by decedent's widow as representative of his estate and as next friend to his minor children.

[1, 2] The Supreme Court first recognized a cause of action for wrongful death based on general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). In instances where the Death on the High Seas Act (DOSHA)[3] is

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1. 46 U.S.C. § 688.

2. 46 U.S.C. § 763.

3. 46 U.S.C. § 761 et seq.

applicable,[4] the elements of the general maritime claim are also derived from it. *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

Higginbotham arose out of deaths resulting from a helicopter crash outside of United States territorial waters. The Supreme Court denied recovery for injuries resulting in nonpecuniary losses under the general maritime law, *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), because DOSHA specifically limits recoverable damages to those pecuniary in nature.

Following the admonitions in both *Moragne* and *Higginbotham* to refer to existing statutes in completing the structure of the general maritime law claim, the Second Circuit in *Public Administrator of the County of New York v. Angela Compania Naviera,* 592 F.2d 58 (2d Cir. 1979), held that only laches barred a *Moragne*-type general maritime law death claim arising from death outside territorial waters, but treated the two year DOSHA statute as analogous.[5]

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4. DOSHA is applicable to the death of a person who is not a Jones Act seaman whenever the wrongful act occurs on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States. 46 U.S.C. § 761. The statute has been applied when the cause of action arises outside of United States territorial waters and within the territorial waters of a foreign country. *Public Administrator of the County of New York v. Angela Compania Mariera,* 592 F.2d 58 (2d Cir. 1979); *Mancuso v. Kimes, Inc.,* 484 F.Supp. 453 (S.D. Fla. 1980); *Cormier v. Williams/Sedco/Horn Constructors,* 460 F. Supp. 1010 (E.D. La. 1978). *See Roberts v. United States,* 498 F.2d 520 (9th Cir. 1974).

5. ". . . given the clarity of the Supreme Court's instruction to apply the two-year statute of limitations of the Death on the High Seas Act to wrongful death actions under the general maritime law, and given the Court's repeated expression of concern

[3-5] However, the mandate of *Moragne-Higginbotham* appears to us to be more specific. In our opinion, the *Higginbotham* rationale compels the application of the DOSHA statute of limitations in undiluted force to a wrongful death claim under general maritime law which arises outside of the United States territorial waters.[6] We note, however, that even in the event that only laches applied, the expiration of the DOSHA-analogous period would require the plaintiff to show the absence of prejudice to the defendant and the reasonableness of the delay. *Barrios v. Nelda Faye, Inc.*, 597 F.2d 881 (5th Cir. 1979); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Akers v. State Marine Lines, Inc.*, 344 F.2d 217 (5th Cir. 1965). Neither has been demonstrated. Therefore, we conclude that the claims were not timely presented.

[6, 7] The plaintiff's Jones Act claim is also time-barred under the statute of limitations provided in that statute.[7]

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for uniformity in the administration of this judge-made cause of action, the plaintiff in this case has the burden of showing what this court has called 'strong justification for delay.'" *Public Administrator of the County of New York v. Angela Compania Naviera*, 592 F.2d at 64 (2d Cir. 1979).

6. The Supreme Court stated in *Higginbotham* that DOSHA ". . . announces Congress' considered judgment on such issues as the beneficaries, the *limitations period*, contributory negligence, survival, and damages." (emphasis added) 436 U.S. at 625, 98 S.Ct. at 2015, 56 L.Ed.2d at 587.

7. 46 U.S.C. § 688 incorporating by reference Federal Employers' Liability Act, 45 U.S.C. § 56: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." The running of this statutory limitations period is not tolled, as urged by plaintiff on appeal, by the infancy of the minor children for whom the plaintiff sues as next friend. *See Sgambati v. United States*, 172 F.2d 297 (2d Cir. 1949), *cert. denied*, 337 U.S. 938, 69 S.Ct. 1514, 93 L.Ed.2d 1743 (1949) (minority does not toll the statute of limitations under Suits in

[8-10] We turn, then, to the contention that Loffland Brothers is estopped to raise the limitation period as a defense. The equitable principle of estoppel prevents a defendant whose representations or other conduct have caused a plaintiff to delay filing suit until after the running of the statutory period from asserting that bar to the action. *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959). Equitable estoppel is applicable to a claim under the Jones Act. *Burke v. Gateway Clipper, Inc.,* 441 F.2d 946, 949 (3d Cir. 1971); *Holifield v. Cities Service Tanker Corp.,* 421 F.Supp. 131 (E.D. La. 1976); *George v. Hillman Transportation Co.,* 340 F.Supp. 296 (W.D. Pa. 1972). The nature of the representations and of the conduct of the defendant are of crucial significance in determining whether the plaintiff is to be allowed to invoke this equitable principle. *Burke v. Gateway Clipper, Inc.,* 441 F.2d 946 (3d Cir. 1971).

[11] The estoppel principle has been successfully invoked where the defendant made active misrepresentations to the plaintiff regarding the plantiff's legal rights,[8] as well as in cases where the defendant promised to pay the claim or to settle if the plaintiff did not file suit.[9] How-

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Admiralty Act and Public Vessels Act); *Osbourne v. United States,* 164 F.2d 767 (2d Cir. 1947) (dicta), (Infancy does not toll the statute of limitations under Jones Act). *Accord, Scarborough v. Atlantic Coastline Ry. Co.,* 178 F.2d 253 (4th Cir. 1949).

8. *Glus v. Brooklyn District Terminal,* 359 U.S. 232, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959); *Scarborough v. Atlantic Coastline Ry. Co.,* 178 F.2d 253 (4th Cir. 1949).

9. *United States v. Reliance Ins. Co.,* 436 F.2d 1366 (10th Cir. 1971); *United States v. Fidelity and Cas. Co. of N. Y.,* 402 F.2d 893 (4th Cir. 1968); *Longo v. Pittsburgh and Lake Erie Railroad Co.,* 355 F.2d 443 (3d Cir. 1966); *United States v. Continental Cas. Co.,* 357 F.Supp. 795 (E.D. La. 1973).

ever, in order to create an estoppel, the conduct of the defendant must be so misleading as to cause the plaintiff's failure to file suit.[10]

Here, there was no evidence of such misrepresentations. Mrs. Sanchez's deposition indicates that Loffland Brothers made no affirmative misstatements regarding her legal rights and they did not promise any benefit to her if she refrained from filing suit.[11]

[12, 13] "When a movant [for summary judgment] makes out a convincing showing that genuine issues of fact are lacking, it becomes incumbent on the adversary to adequately establish by receivable facts that a real, not formal, controversy exists." *Ernest, Inc. v. General Motors Corp* 482 F.2d 1047 at 1049 (5th Cir. 1973).[12]

Summary judgment is properly rendered for the defendant on the basis of the expiration of the statute of limitations unless the plaintiff presents facts in accordance with F. R. Civ. Proc. 56(e) which create a genuine factual issue as to defendant's conduct that would equitably estop

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10. *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3d Cir. 1971).

11. According to the affidavit of the plaintiff's brother, Loffland Brothers' representative told the plaintiff that her son would be employed by Loffland Brothers as long as the plaintiff did not "go against" the company in any action. However, in her deposition the plaintiff does not indicate that such a condition was attached to her son's employment by the defendant. She states that no mention was made to her of her rights under American law. The recollection of the brother of the plaintiff does not sufficiently support the inference that the plaintiff was misled causing her not to file suit.

12. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-161, 90 S.Ct. 1598, 1609-1610, 26 L.Ed.2d 142 (1970); *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978); *Sweet v. Childs*, 507 F.2d 675, 679 (5th Cir. 1975).

him from asserting the statutory bar.[13] No such factual issue has been created.

The plaintiff having failed to meet the required burden of proof, the defendant was entitled to summary judgment.

For these reasons the judgment is AFFIRMED.

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13. 6 Pt. 2 Moore's Federal Practice ¶ 56.17[21], at 56-854 (2d ed. 1948). *See Longo v. Pittsburgh and Lake Erie Railroad Co.*, 355 F.2d 443 (3d Cir. 1966); *Begnaud v. White*, 170 F.2d 323 (6th Cir. 1948). But *cf. Bomba v. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3d Cir. 1971) (plaintiff's burden is to present facts which, as a matter of law, would estop defendants from asserting statute of limitations).

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO 80-1025

HELI RAMON SANCHEZ, and
AIDA DE SANCHEZ, Individually and as representative and Administratrix of the children and estate of HELI RAMON SANCHEZ,
Plaintiffs-Appellants,

v.

LOFFLAND BROTHERS COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Sonthern District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 10-1-80, 5 Cir., 197__, ____F.2d____).

(January 8, 1981)

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appel-

late Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ A. B. RUBIN
United States Circuit Judge

APPENDIX 4A

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250 § 33, 41 Stat. 1007.

APPENDIX 4B

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the Courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

APPENDIX 4C

46 U.S.C. § 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

APPENDIX 4D

46 U.S.C. § 763. Limitations

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

Mar. 30, 1920, c. 111, § 3, 41 Stat. 537.

APPENDIX 4E

Rule 8(c). Federal Rules of Civil Procedure

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

APPENDIX 4F

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidvaits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon

the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX 5

I, Heli Ramon Sanchez, Venezuelan, being over the age of majority, do make the present declaration of my own free will.

Approximately five days after the injury and death of my father, Heli Ramon Sanchez, while he was working for the Loffland Brothers Company, I was at home with my mother, Aida Cardozo de Sanchez, when Mr. Romulo Lujano, an employee of Loffland, came to see my mother with respect to the payment of money which Loffland owed to her. I was present while they were conversing, and Mr. Lujano clearly told my mother that with this payment that Loffland was making to her, it no longer owed her anything else, and that she would receive this payment because what they were paying her, was all that Loffland had to pay her, and that in addition she did not need to worry about the future because Loffland would be attending to her needs and those of us, the children of Heli Ramon Sanchez.

He also told my mother that it was preferable to always be in agreement with Loffland, because like that Loffland would protect her and attend to her needs, and that it was not convenient for her to be in opposition to the company.

Romulo Lujano also told my mother during the conversation, that she should not worry because they were going to give me a job in order to help us economically, because the company wanted to help us, and for that reason it was good to be in agreement with Loffland. A few days later, this same Mr. Lujano, ordered me to go to the Company, that they were going to give me a

job, as if he were sure that they would, and today I am still working for Loffland.

Lujano told my mother that it was preferable to be in agreement with Loffland, because like that they would give me a job and they would pay her what they were giving her at that time, and that if she was not in agreement with this payment, they could not give her anything and they would then not give me a job.

I affirm that this statement is the truth.

Signed: Heli Ramon Sanchez

APPENDIX 6

I, Even Cardozo, Venezuelan, being over the age of majority, residing in the District of Urdaneta in the State of Zulia, Venezuela, declare the following:

I am the brother of the widow, Aida de Sanchez, and approximately four or five days after my brother-in-law Heli Ramon Sanchez suffered an accident and died while working for the Loffland Brothers Company, I was at my sister's, Aida Cardozo de Sanchez, house, when an employee of Loffland named Lujano, arrived, saying that he wanted to talk with my sister, Aida.

He said that he wanted to talk to her with respect to the payments that Loffland was going to give her because of the death of my brother-in-law and then he came in to talk to her.

In the conversation, Mr. Lujano told my sister Aida, that he had brought the payment which was due according to the law, but that in addition, Loffland was worried about her and that in the future she would not have any problems because Loffland would be attending to her. Mr. Lujano explained to my sister, Aida, that what he was giving her was all that could be claimed according to the law, and that no other amount of money was due her, and that those were all her rights, and that at one time the company wanted to cancel everything that was due her, but that she should not worry because in the future, Loffland was going to help her and my nephews.

He also told her that the best thing would be to continue with Loffland, because the company was going to help her, and that in addition, so that she would not have

any economic problems, they were going to give a job to the son of my sister, Heli Ramon Sanchez, as long as she didn't maintain any action against the company, and that she would receive the payment.

Really, a few days later my nephew, Heli Ramon Sanchez, began working as a laborer for Loffland, and he is still working with Loffland in Maracaibo. Lujano told my sister that it was necessary that she sign to give a job to my nephew, and to give her the money that he had brought, because if she didn't sign, he would take the payment back to Loffland and then they wouldn't give a job to my nephew, Heli Ramon Sanchez, then my sister accepted Loffland's offer and they gave her a check and they gave a job to Heli Ramon Sanchez, a few days later.

Signed: Even Cardozo

MAY 30 1981

ALEXANDER L. STEVAS,
CLERK

NO. 80-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIDA SANCHEZ, Individually And As Representative And Administratrix Of The Children And Estate Of HELI RAMON SANCHEZ, DECEASED,
Petitioner

v.

LOFFLAND BROTHERS COMPANY, LOFFLAND BROTHERS DE VENEZUELA, C.A., LOFFLAND BROTHERS OF VENEZUELA, INC., LOFFLAND BROTHERS OF CANADA, INC. and MID-CONTINENT SUPPLY COMPANY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOFFLAND RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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NO. 80-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIDA SANCHEZ, ETC.,
Petitioner

v.

LOFFLAND BROTHERS COMPANY, ET AL.,
Respondents

LOFFLAND RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Justices of Said Court:

The Loffland Respondents submit that the Petitioners'[1] Petition for Writ of Certiorari should be denied and would respectfully show as follows:

---

1. "Petitioners" seek damages under the Jones Act and general maritime law for a death. Since the Jones Act and the relevant statute prescribing the party entitled to sue under general maritime law, the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, both vest the right to sue solely with the personal representative, the Petitioner will be referred to singularly in this Brief. The Petitioners' List of Parties is otherwise correct except that the third Loffland defendant's proper name is Loffland Brothers of Venezuela, Inc.

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondents suggest, for purposes of clarity, that the questions presented by the Petitioner should be framed in the following manner and in the following order:

I. Whether the Courts below properly applied the holding of *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978), in holding that where Congress has enacted a statutory limitations period that the laches doctrine is inapplicable and that such limitations period must be applied.[2] (Pertinent to Petitioner's Questions 1, 2, 3 and 4 and Sections I, II and III of Petitioner's Argument and Reasons).

II. Whether the District Court correctly determined that the Respondents were not estopped to assert the statutes of limitations as a bar to this action? (Pertinent to Petitioner's Questions 5 and 6 and Section IV of Petioner's Argument and Reasons).

---

2. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different *statute of limitations,* or a different class of beneficiaries." 436 U.S. 618, 625; (emphasis supplied).

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NO. 80-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIDA SANCHEZ, ETC.,
Petitioner

v.

LOFFLAND BROTHERS COMPANY, ET AL.,
Respondents

LOFFLAND RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

This matter concerns a wrongful death action instituted by a citizen and resident of Venezuela seeking recovery against her husband's former employer and others as a result of an incident which occurred on February 3, 1974, on Lake Maracaibo, in Venezuela. Suit was instituted in the Southern District of Texas in July, 1977. Petitioner later added additional parties and amended the Complaint, alleging causes of action based on the Jones Act, 46 U.S.C. § 688 (1970), and the general maritime law.

As part of her amended pleading, Petitioner alleged that the Respondents were estopped to assert any statute of limitations. The Petitioner's deposition was obtained, together with deposition testimony of Venezuelan employees of Loffland Brothers de Venezuela, C.A., and Motions for Summary Judgment were filed by Respondents. After examining the testimony of Mrs. Sanchez, the testimony of the other witnesses and the affidavits submitted in opposition to the Motion for Summary Judgment, the District Court granted the Motions, finding no genuine issue of fact presented which precluded the application of the appropriate statutes of limitations.

B. Statement of Facts.

Suit was instituted in this matter on July 27, 1977, by Aida de Sanchez. (R. 1). The basis of the action was an accident which occurred on February 3, 1974 (R. 2), and by later amendment, it became clear that the basis of the causes of action alleged against Respondents was the Jones Act and the general maritime law. (R. 102). Petitioner received full and complete compensation in Venezuela pursuant to the laws of that country from her husband's employer, Loffland Brothers de Venezuela, C.A., with whose representatives she conferred following his death. According to her own testimony, Petitioner was told that she was receiving all of the compensation which she was entitled to receive under her husband's employment contract and under Venezuelan law. (Sanchez deposition, p. 52, line 20 - p. 53, line 2). Additionally, Mrs. Sanchez categorically testified that no mention was made to her concerning American law or any statute of limitations under such law. (Sanchez deposition, p. 55, line 19 to p. 56, line 7). Her testimony revealed no

representations by Loffland Brothers de Venezuela, C.A.'s employees relating to any possible further settlement or to any statute of limitations. The record is completely devoid of any conversations, representations or any other contact between Mrs. Sanchez and representatives of the other defendants, Loffland Brothers Company, Loffland Brothers of Venezuela, Inc., Loffland Brothers of Canada, Inc. and Mid-Continent Supply Company.

SUMMARY OF ARGUMENT

I. The decisions of the District Court and the Court of Appeals for the Fifth Circuit were correctly based upon the Court's holding in *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), and are not in conflict with that opinion, nor with the Court's opinions in *American Export Lines v. Alvez,* No. 79-1, ____U.S. ____, 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980); *Moragne v. States Marine Lines,* 398 U.S. 375 (1970); or *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974).

It is undisputed that the case is one which was filed more than three years after the incident in question and is one which is based on the Jones Act and general maritime law. The Jones Act statute of limitations is three years, 45 U.S.C. § 56, (1970), and the two year statute of limitations of the Death on the High Seas Act, 46 U.S.C. § 763 (1970), is applicable to the general maritime law contentions as reflected by the Court's decision in *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978). The general maritime law claim made by Petitioner, if viable, would be governed by the Death on the High Seas Act (DOHSA) since it occurred outside the coastal waters of the United States, to wit, in Venezuelan waters. 46 U.S.C. § 761 (1970).

The contentions made by Petitioner with respect to the application of the doctrine of laches by the Court of Appeals are simply untrue. The Court of Appeals for the Fifth Circuit in its opinion clearly holds, quite properly, that the statutes of limitations bar the claims and notes in passing that even if laches were proper consideration, that DOHSA would provide the analogous time reference and would require explanation by the Petitioner relating to the delay. The decision from the Second Circuit, *Public Administrator of the County of New York v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir. 1979), *writ dism'd* 443 U.S. 928 (1979), as was noted in the Fifth Circuit opinion below, is stated in the Second Circuit opinion to be one based on the involvement of nonstatutory remedies, and, thus, one clearly distinguishable from this matter which involves statutes which prescribe specific limitations periods. The *Alvez, Moragne* and *Gaudet* cases likewise involve incidents occurring in coastal waters and, thus, claims to which specific statutory language was not directed. Moreover, any need for review of the issue presented herein by this Court, in view of passage of the uniform three year statute of limitations for personal injury or death arising from a maritime tort, 46 U.S.C. 763a, 94 Stat. 1525 (October 6, 1980), is virtually destroyed since that statute will clearly apply to any new actions of this type, and the Court has already made clear its views concerning prior actions in the *Higginbotham* opinion.

II. The Petitioner's attempts to raise an issue on estoppel sufficient to preclude summary judgment fell short of that required to raise a genuine valid issue upon which it could be concluded that any of the Defendants below were guilty of conduct sufficient to

estop their applying the relevant statutes. The cases which have considered the estoppel argument reflect that there must be (1) an affirmative statement that the statutory period to bring the action was longer than it actually was, or (2) promises to make a better settlement of the claim if plaintiff did not bring suit, or (3) comparable representations and conduct. *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3d Cir. 1971). The testimony of the Petitioner was insufficient to raise such issues, and the subsequent affidavits submitted by Petitioner from her brother and son failed to raise a genuine issue of fact in this regard, as well, for they in no way reflected any reliance by Petitioner on any statements of Respondents in failing to bring suit within the statutory period. The Courts below properly applied the legal rationale of the *Burke* Court and the Court in *Glus v. Eastern District Terminal,* 359 U.S. 231 (1959). The basic determinations made by the District Court and already reviewed by the Court of Appeals initially and on Motion for Rehearing do not warrant review by this Court.

ARGUMENT AND AUTHORITIES

I. THE LOWER COURTS PROPERLY APPLIED THE STATUTES OF LIMITATION TO THIS CASE.

Petitioner's causes of action are based on the Jones Act, 46 U.S.C. § 688 (1970) and the general maritime law. The general maritime law claim, however, is governed by the provisions of the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (1970), since the incident occurred outside U.S. coastal waters. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978). The incident occurred in

Venezuela, on Lake Maracaibo, a body of water connected to the sea and upon which oceangoing vessels sail and on which there is oil drilling activity. The statutes of limitations applicable to the causes asserted bar recovery by the Petitioner, for they read as follows:

THE JONES ACT

The applicable statute of limitations with respect to the Jones Act is contained in 45 U.S.C. § 56 (1970) which provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

DEATH ON THE HIGH SEAS ACT

The applicable statute of limitations is found in 46 U.S.C. § 763 (1970) and provides:

> Suit shall be begun within two years from the date of such wrongful act, negligence or default. . . .

The statutory provisions set forth above clearly and completely bar any action filed on behalf of anyone, including Petitioner, the wife of the decedent involved in this matter, and the causes of action cannot be maintained, even if applicable.[3]

A. A Conflict with Higginbotham Does Not Exist.

The Court has recently held that insofar as a general maritime law claim for death arising outside the coastal

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3. Respondents do not admit that the Petitioner has any such cause of action and have reserved jurisdiction, venue and choice of law questions, which would require additional extensive discovery, since the entire matter is disposed of in a simpler manner on the limitations question.

waters of the United States is concerned, the limitations period prescribed in the Death on the High Seas Act applies. We quote from *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978):

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty Courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the *limitations period*, contributory negligence, survival and damages.
>
> * * *
>
> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different *statute of limitations*, or a different class of beneficiaries. 436 U.S. 618, 625; (emphasis supplied).

It is abundantly clear from the statutory provisions and the Court's decision that the action here, based on events occurring outside the coastal waters of the United States, is barred since it was not commenced within the period prescribed by either statute relevant to the claims asserted.

B. There Is No Conflict With Alvez, Moragne Nor Gaudet.

Moreover, the Court's decisions in *Alvez*, *Moragne*, and *Gaudet* do not provide any basis for distinguishing this case from the *Higginbotham* case insofar as the

limitations point is concerned. Contrary to the assertions made in the Petition, the decision in *American Export Lines, Inc. v. Alvez*, No. 79-1, ____U.S.____, 64 L.Ed.2d 284, 100 S.Ct. 1673 (1980), casts no doubt with respect to the holding of *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and its relation to the case now before the Court. As Petitioner has noted, the *Alvez* case involved a situation distinctly different from the one before this Court, bearing on the question of damages in a factual situation where an accident had occurred in territorial waters of the United States. Here, of course, the accident occurred well outside the territorial waters of the United States, on Lake Maracaibo, Venezuela. Thus, the Death on the High Seas Act and Jones Act must provide the basis for and, thus, control from a limitations period standpoint, whatever, if any, remedy that the Petitioner would have under United States law, and the general maritime law theory of laches would not be applicable to their claim. The *Alvez* Court recognizes this in language quoted by Petitioner:

> To be sure, *Mobil Oil Corp. v. Higginbotham, supra,* construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But *Higginbotham* never intimated that the preclusive effect of DOHSA extends *beyond the statute's ambit.* 64 L.Ed.2d 284, 291 (emphasis supplied).

The *Alvez* opinion thereby reaffirmed the holding of *Higginbotham* that where DOHSA or the Jones Act provide the remedy, such enactments prescribe such matters as damages and the statute of limitations which are within "the statute's ambit." This view is supported by another quotation from *Alvez* which the Petitioner's attorney uses

in an effort to bolster Petitioner's contentions by appealing to the liberal nature of the maritime law which is noted to be predisposed to grant rather than withhold remedies with the proviso, however, quoting *Moragne, "when not required to withhold (them) by established and inflexible rules."* 64 L.Ed.2d 284, 291 (emphasis and parenthetical explanation supplied). As noted above, the *Higginbotham* opinion clearly reflects that matters such as a statute of limitations fall within the rules prescribed by the Death on the High Seas Act and the Jones Act, and petitioner's contention that a time bar determination should be based on the laches doctrine of the general maritime law is clearly incorrect. To paraphrase *Alvez,* each of the statutes upon which Petitioner must rely to state a cause of action include a limitations period which has been exceeded and which provides an established rule and reference requiring the withholding of whatever remedy may have been available prior to expiration of the statutory period.

Gaudet and *Moragne* likewise dealt with coastal waters situations and with damage issues under general maritime law, not with specific statutory language such as that with which we are here concerned. The Petitioner's arguments regarding laches and *Moragne* are based on the premise that DOHSA did not encompass a claim for death based on unseaworthiness, a premise recognized at least since the mid 1960's to be a false one. *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465, 468 (2d Cir. 1966). *Moragne* only supplied a wrongful death remedy in coastal waters and in no manner altered DOHSA, which already governed death actions based on unseaworthiness outside the coastal waters, as *Moragne* itself recognizes. *Moragne* holds that DOSHA permits and, thus, incorporates not

only recoveries based upon neglect but also on the unseaworthiness of the vessel under the maritime law.

> The ruling (in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964)) thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, (citation omitted) or for death on the high seas caused by unseaworthiness, (citations omitted). 398 U.S. 375, 396, n.12 (1970).

Moragne, therefore, merely supplied a wrongful death remedy in a coastal waters context where no such remedy had existed under the applicable state law and where DOHSA clearly did not apply, and at the same time recognized that DOHSA already encompassed the seaworthiness remedy.

C. There Is No Conflict With The Second Circuit Opinion In Angela

Neither does the Second Circuit decision cited by Petitioner, *Public Administrator of the County of New York v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir. 1979), *writ dism'd*, 443 U.S. 928 (1979) provides a basis for conflict, as Petitioner alleges, since the issue before that Court was stated to be one involving the proper time limitations period for a *nonstatutory* remedy for wrongful death. The Court so states:

> Until 1970 there existed no independent, nonstatutory remedy for wrongful death under the general maritime law. Now, however, a remedy exists. (Citing *Moragne*). In this appeal we are called upon to consider the proper time limitation for this (*Moragne*) cause of action. (Parenthetical explanation supplied). 592 F.2d 58, 59-60.

Thus, the Second Circuit characterizes for its decision an issue not involving the application of the Death on the High Seas Act or Jones Act but, instead, a question concerning the time limitation in a nonstatutory cause of action, a situation distinctly different from that before the Court here. Even there, of course, the Court determined that the two year DOHSA statute of limitations was the analogous period for determining the applicability of laches to the general maritime law death claim.

Accordingly, the statutes of limitations contained in the Jones Act and the Death on the High Seas Act correctly provide the basis for a dismissal on a limitations basis in this cause pursuant to the Court's holding in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978). The Fifth Circuit Court of Appeals correctly applied the *Higginbotham* rationale to the facts before it and would be required to do so with respect to any similar situation with which it is presented in the future in view of the recent enactment of a uniform three year statute of limitations, as noted above. Even if, as Petitioner alleges, the *Angela* case could be viewed as a conflict with the Fifth Circuit opinion, the new statutory enactment will apply to virtually all cases with which the lower courts must hereafter deal, and a review of the holding of the Court in *Higginbotham* would not provide a basis for deciding any significant number of cases in the future.

II. THE LOWER COURTS PROPERLY FOUND NO ESTOPPEL ISSUE HAD BEEN RAISED BY PETITIONER.

In Section IV of the Petition, a review is sought of the holding of both Courts below concerning the conduct of the Defendant Loffland Brothers de Venezuela, C.A.,

about which Mrs. Sanchez testified at length as reflected in part by the testimony quoted in the District Court Memorandum and Order (Appendix 1 of the Petition). The legal test applied by the Courts below was in accord with the Court's opinion in *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) and that of other Courts in *Burke v. Gateway Clipper, Inc.,* 441 F.2d 946 (3d Cir. 1971), and *Holifield v. Cities Service Tanker Corp.,* 421 F.Supp. 131 (E.D. La. 1976) *aff'd,* 552 F.2d 367 (5th Cir. 1977). The myriad cases cited by Petitioner largely deal with situations closely analogous to the *Glus* case, being situations involving blatant misrepresentations with respect to the statute of limitations involved, misrepresentations of physicians employed by defendants or like misrepresentations. The conduct of Loffland Brothers de Venezuela, C.A., as testified to by the Petitioner, was examined by the District Court, was examined by the Circuit Court panel in the first instance and, again, on Motion for Rehearing, and the Courts correctly found no genuine issue of fact for determination insofar as the estoppel issue was concerned.

The testimony of Mrs. Sanchez is clear concerning the relevant issues:

> (1) Was there a misrepresentation with respect to the statute of limitations: Her testimony was as follows:
>
> Q. Nothing (was said by Loffland de Venezuela representatives) about how long you had to bring a lawsuit—how much time you had to bring a lawsuit in the U.S.?
>
> A. No.
>
> (Sanchez deposition, page 56, lines 4-7, parenthetical explanation supplied).

(2) Did Loffland promise her additional payments or a better settlement? Her testimony is clear, once again:

Q. Did (representatives of Loffland Brothers de Venezuela, C.A.) tell you that any additional money that you would receive would have to come from the social security scheme of Venezuela?

A. Yes.

(Sanchez deposition, page 55, lines 15-18, parenthetical explanation supplied).

The evidence in this case establishes simply that Loffland Brothers de Venezuela, C.A. paid full and complete compensation to the survivors as required by Venezuelan law. The decision in *Burke* makes it clear that this does not constitute a fraudulent or wrongful act or misrepresentation which will preclude any Respondent's reliance upon any statute of limitations. An employer does not commit a fraudulent or wrongful act or misrepresentation by paying compensation or by not informing the recepient that he or she may have other legal remedies. *See, e.g., Damiano v. Pennsylvania R. Co.,* 161 F.2d 534 (3d Cir. 1947), *cert. denied,* 340 U.S. 821 (1950). Indeed, here, the testimony is uncontradicated that the Venezuelan representatives themselves knew of no rights that Mrs. Sanchez could, even arguably, have under American law. (Sevillano deposition, page 49, line 24 to page 50, line 8; Lujan deposition, page 49, lines 3-9).

Petitioners imply that the employment by Loffland Brothers de Venezuela, C.A. of decedent's son was given in exchange for her cooperation in not instituting this action earlier. There is no dispute that the son was em-

ployed by Loffland Brothers de Venezuela, C.A. after his father's death, but at the same time, there is no evidence that such employment was given in exchange for forebearance on the Petitioner's part or for any consideration whatsoever except in exchange for a day's work on the part of the son.[4] If such circumstances are sufficient to estop Defendants from relying upon statutes of limitation, no death claim will ever be barred by limitations where the employer is compassionate enough to extend condolances to an employee's widow or later to employ a family member.

As the District Court noted, the only apparent attempt by Petitioner to raise a fact issue was in the form of the affidavit of her brother, Even Cardozo, which was obtained and filed well after the deposition of Mrs. Sanchez had been obtained and the Motion for Summary Judgment discussing the law applicable to this matter had been filed. That affidavit, however, as the District Court correctly noted, does not raise an issue of fact relevant to the estoppel issue. As the District Court held, there is no evidence that Mrs. Sanchez was misled by statements which Cardozo, but apparently not Mrs. Sanchez, allegedly heard. Additionally, Mrs. Sanchez seeks to contradict her own testimony with the affidavit of Cardozo, but the cases cited by Petitioner in support of such action's being sufficient to preclude summary judgment, *e.g. Adams v. The United States,* 392 F. Supp. 1272 (E.D. Wisc. 1975) and *Camerlin v. New York Central R. Co.,* 199 F.2d 698 (1st Cir. 1952), deal with situations in which deposition testimony of a witness was contradicted by that witness' own affidavit, not an affidavit of a third party, as is the case here.

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4. Sanchez deposition, page 53, line 10 to page 54, line 9.

The Court below correctly relied on *Holifield v. Cities Service Tanker Corp.*, 421 F. Supp. 131 (E.D. La. 1976), *aff'd*, 552 F.2d 367 (5th Cir. 1977), in noting that only genuine issues of fact are intended to preclude resort to summary judgment. The Court noted in *Holifield*:

> . . . the plaintiff must demonstrate that he actually was misled; . . . it is encumbent upon the Plaintiff to present material facts which, if true, would estop the assertion of the statute of limitations as a matter of law. *See Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948-49 (3 Cir. 1971). 421 F. Supp. 131, 135.

In *Holifield*, it is noteworthy that the plaintiff sought to contradict his sworn prior statements, with the Court holding the following in that regard:

> Furthermore, from the standpoint of the policy and requirements of Rule 56 of the Federal Rules, we decline to allow the plaintiff to raise an issue of fact by contradicting his own sworn statement of an earlier date; it is only *genuine* issues of fact and not simply issues created by the self-contradictions of an opposing party that are intended to preclude resort to the device of summary judgment. 421 F. Supp. 131, 136 (emphasis in original).

Thus, the *Holifield* Court refused to allow the plaintiff's own affidavit and deposition testimony to contradict a prior sworn statement. Here, Mrs. Sanchez seeks to resurrect from the ashes of her own testimony an issue relating to her subjective belief, using a sworn affidavit of a third party relative which was obtained after she had testified categorically with respect to the relevant conversations. The Plaintiff's deposition testimony on the relevant points

is clear and simply raises no fact issue precluding summary judgment disposition of this matter.

The Courts below closely examined the conduct of the Respondents in light of the Court's opinion in *Glus* and the lower Courts' opinions in *Burke, Holifield* and the multiple cases cited by Petitioner. The circumstances related by Petitioner simply do not rise to the level sufficient to create an issue relevant to estoppel, and both Courts below correctly applied the law to the facts before them. The Court has previously addressed the legal test to be applied in the *Glus* case, and since the teachings of that case were correctly applied by the Courts below, the Court should not grant review on the estoppel issue which review would, in any event, be confined to the facts of this case and have limited future value in view of the Court's having already rendered the *Glus* opinion.

CONCLUSION

The District Court and the Court of Appeals correctly applied the law to the facts of this case. The *Higginbotham* rationale is applicable to this case which arose outside the territorial waters of the United States, and the statutes of limitation which form a part of the Death on the High Seas Act and Jones Act are applicable and render the Petitioner's claims untimely. The boot strap attempts to inject a fact issue with respect to the Defendant Loffland Brothers de Venezuela, C.A.'s conduct have been examined by the District Court and the Court of Appeals below, both of which reached the correct result that no issue upon which an estoppel could be based had been raised. Review by this Court is not called for in view of the Court having spoken previously in *Higginbotham* and *Glus* to the points raised by Petitioner and

in view of the recent enactment of a uniform statute of limitations covering maritime torts. Therefore, Respondents respectfully submit that the Petition should be in all things denied.

Respectfully submitted,

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Venezuela, C.A.
Loffland Brothers of
Venezuela, Inc.
and Loffland Brothers of
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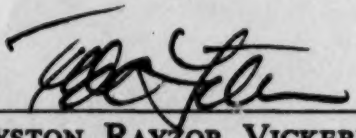
Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Reply was mailed to Mr. Benton Musslewhite, 3506 Travis Street, Houston, Texas 77002, and to Mr. John P. Forney, Jr., Eastham, Watson, Dale & Forney, 947 Mellie Esperson Building, Houston, Texas 77002, on this 27th day of May, 1981.



Of ROYSTON, RAYZOR, VICKERY & WILLIAMS